



Federally Speaking



Number 9
by Barry J. Lipson

*The Western Pennsylvania Chapter of the Federal Bar Association (FBA), in cooperation with the Allegheny County Bar Association (ACBA), brings you the editorial column **Federally Speaking***

“WHERE LAW ENDS, TYRANNY BEGINS!” “Where law ends, tyranny begins,” so said United States Supreme Court Justice Sandra Day O’Connor, quoting Margaret Thatcher, on the occasion of Justice O’Connor being awarded the first “Carol Los Mansmann Award for Distinguished Public Service” by the Western Pennsylvania Chapter of the Federal Bar Association, before a packed house of 1000 well-wishers in the Duquesne University Student Union Ballroom. She was driving home the point that in light of the recent terrorist attacks the rule of law must be maintained. “The need for lawyers does not diminish in times of crisis,” she stressed, “it only increases.” Your columnist had the honor of presenting her with this award and “pinning” the “Honorable” Honorary FBA Member O’Connor with an FBA recognition pin. The Carol Los Mansmann Award for Distinguished Public Service will be awarded annually by the West Penn Chapter, in conjunction with the Duquesne University School of Law, to “a public figure who has made unique and outstanding contributions to the legal profession through diligence, dedication to principle, and commitment to the profession’s highest standards.” Attributes exemplified by U.S. Court of Appeals Third Circuit Judge Carol Los Mansmann.

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HOMELAND SECURITY AND THE BILL OF RIGHTS. The new and first Director of Homeland Security for the Good Ole U. S. of A., former Pennsylvania Governor Tom Ridge, in his Farewell Remarks to the Pennsylvania General Assembly stressed Civil Liberties, saying: "In a few days, I'll be at my post at the Office of Homeland Security. I want to assure you that I will do everything in my power to protect us -- and our way of life. Ben Franklin said. 'Those that can give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.' Liberty is a precious gift. It is what the terrorists fear most -- what they hate most -- and what they tried to take away from us on September 11th. We must reject the false choice of liberty versus security. We can and must have both. We will be safe. And we will not let the terrorists change our essential way of life." And with regard to tolerance he said: "All Americans, not just those of us living in Penn's Woods, are inheritors of William Penn's legacy of religious tolerance. To those Americans who would lash out at your fellow citizens simply because they worship differently -- or dress differently -- or look differently than you -- there is a word for such behavior -- Terrorism. And it must stop."

THE FTC AND CONSUMER PRIVACY. Subsequent to the terrorist activities of September 11th, **Federal Trade Commission** Chairman Timothy J. Muris outlined the **FTC's** new and continuing Privacy Agenda, which includes increasing resources dedicated to consumer privacy protection by 50 percent. He pledged that the **FTC** “will do all it can to protect consumer privacy in the commercial realm - both online and off-line.” According to Chairman Muris, the new Privacy Agenda will contain the following major law enforcement and education initiatives: Enforcing the Telemarketing Sales Rule and Protecting Consumers From Unwanted Telemarketing; Creating a National Do-Not-Call List; Regulating and Restricting the Use of Pre-Acquired Credit Card Numbers and Account Information; Prosecuting and Stopping Pretexting, which is Outlawed by the **Gramm-Leach-Bliley Act (GLB)** (“pretexting” is the practice of obtaining personal financial information by fraud); Beefing Up Enforcement Against Deceptive Online Spam; Enforcing The **Children's Online Privacy Protection Act** (to prevent the collection of personally identifiable information from young children without their parents' consent); Controlling Identity Theft and Helping Victims of ID Theft; Encouraging Accuracy in Credit Reporting and Increasing **Fair Credit Reporting Act (FCRA)** Enforcement (the nation's first major privacy protection law); Enforcing Private Privacy Policies and Promises; Tracking and Improving Consumers' Privacy Complaint Handling; and Holding Privacy-related FTC Workshops. Indeed, since the provisions of the **Gramm-Leach-Bliley Act**, outlawing "pretexting," went into effect in 1999, the FTC has already increased its enforcement efforts to stop the misuse of sensitive financial information, and has recently obtained injunctions against information brokers in three different cities, using evidence obtained through a telephone sting operation. Muris advised that the **FTC** “will expand our activities here to examine other practices that try to obtain personal information through misrepresentations.”

WHAT'S THAT BLANKETY-BLANK “USF,” REALLY? The **USF**, a/k/a **CHCF-A, CHCF-B, Universal Service Charge and Universal Service Fund Charge**, was born on January 1, 1998, as part of the **Federal Communication Commission's (FCC)** re-thinking of telephone fees. Starting as of then all carriers providing telephone service between states are required to pay a direct “tax” based on a set percentage of their previous year's billings, for the purpose of subsidizing affordable access to telecommunications services for telephone customers with low incomes, telephone customers who live in areas where the cost of providing telephone service is prohibitive, rural health care providers, libraries and schools. While all carriers pay the same percentage on their total annual billings, they are permitted to recoup this payment in any amount and manner they see fit, or absorb it. Some carriers do just that, they absorb it! Most, however, use differing dollar amounts and methods of “recoupment.” Some charge their customers a flat fee, others charge a percentage of the interstate and international usage, and still others charge a percentage of the entire bill. Of course, they keep any difference between what they pay and what they collect. But why “blankety-blank”? Because it is normally presented to the telephone customers as merely another “immutable government imposed charge” and not as what it really is, another significant competitive factor they must take into account to determine who is REALLY offering them the best price and what they are REALLY paying per minute.

BUT THAT'S THE ONLY ONE; THE FTC PROTECTS US OTHERWISE, RIGHT? You would think that where a billed charge is not a uniform governmental tax or charge, and such charge has not been specifically permitted by another government agency (such as the **FCC** -- see above), governmental agencies such as the **FTC** would not permit sellers to

add disguised or hidden charges to consumer products and services so that consumers are misled when trying to compare prices between competing suppliers or otherwise; or worse yet when a combination of competitors in effect secretly agrees to and does raise prices by each adding this surreptitious new charge. Of course, in most cases, these surreptitious charges either only appear after the quote is given, the reservation is made, the order is written, the guest checks-in, etc., or are never adequately disclosed, being concealed through the use of minute print, small notices, signs distant from the point of sale, apparent disclosures on sales slips or documents not actually brought to the consumers attention before or at the time of sale, etc. A few (very few) cases in point: Firestone's "Shop Charge" allegedly for nuts and bolts, etc., that may or may not have been used; National Car Rental's "Concession Recoup Fee" allegedly for having rental stations in prime locations; Marriott's "Energy Fee" allegedly to recoup increased costs without visibly raising room rates; other hotels' "Telecommunication Fees" allegedly for in-room telephone services that are there anyway; etc., etc., etc. And it is certainly not enough to just remove these charges if consumers happen to notice! We challenge the **FTC** to also protect consumers from these clearly deceptive and "unfair trade practices."

THE CARBIDE/GRAPHITE GROUP FILES FOR BANKRUPTCY. On September 21, 2001 The Carbide/Graphite Group. ("C/G") filed a petition in Pittsburgh for protection under **Chapter 11 of the U.S. Bankruptcy Code**. According to the C/G Press Release "Industry conditions and many other uncontrollable factors have continued to plague C/G." In the July 13, 2001 Federally Speaking Column we reported that the **US Department of Justice (DOJ)** had formally acknowledged that "The Carbide/Graphite Group of Pittsburgh, cooperated in the investigation" of the international graphite electrode rod price-fixing cartel. Then in our September 7, 2001 Column we reported that C/G had "been fined \$8,850,000 by the **European Commission** as its share of the \$189,000,000 in fines levied by the **EU** against the eight co-conspirators in this international graphite rod price fixing conspiracy," which was "nearly twenty per cent of the at least \$45,000,000 reserve C/G has set aside to cover 'potential liabilities which may result from civil lawsuits, claims, legal costs and other expenses associated with the antitrust matters noted above'." One wonders how "many [of these] other uncontrollable factors [which] have continued to plague C/G" are "associated with" C/G's antitrust woes.

MICROSOFT: ANTI-TRUST AND ANTI-MEDIATION. Judge Thomas Penfield Jackson tried it! He required Microsoft and the government to participate in four months of forced settlement negotiations culminating in his appointing of an appellate judge as a mediator. This failed. Now both Microsoft and the government have advised their new **U.S. District Court** Judge, Judge Colleen Kollar-Kotelly, that while they "will continue to seek settlement of this matter through private discussions, which are ongoing," the Court "should continue simultaneously with proceedings addressed to [the] remedy" aspects of this antitrust prosecution, without the appointment of a mediator. We suspect neither side wants to be confronted even privately with a neutral's potential informal evaluations of the strengths and weaknesses of their respective positions.

DOJ CHARGES "GUN JUMPING." The **U.S. Department of Justice (DOJ)** has filed a civil antitrust lawsuit against Computer Associates International Inc. and Platinum Technology International Inc. for violating the pre-merger waiting period requirements and price fixing laws, by agreeing that Platinum would limit the price discounts and other terms it offered its customers during the mandatory pre-merger waiting period. This conduct, known as "gun jumping," violates the "hold separate" requirements established under the **Hart-Scott-Rodino Pre-merger Notification Act of 1976 (HSR)**, as well as

Section 1 of the Sherman Antitrust Act. "This conduct prematurely reduced competition between the companies," advised Charles A. James, Assistant Attorney General in charge of the **DOJ's Antitrust Division**. "Merging parties must strictly adhere to the requirements of the **HSR Act** and maintain their companies as separate and independent competitors during the **HSR** waiting period." The **DOJ** is seeking a total civil penalty of \$1.267 million from Computer Associates and Platinum, and a prohibition against Computer Associates engaging in such conduct in the future. So, remember, do not cross the starting line until the starting pistol is fired, or your antitrust woes may be trebled.

FOR THE RECORD – JERSEY STANDS UNDIVIDED! By a vote of 10 to 9 the Judges of the **U.S. District Court for the District of New Jersey** voted to approve **House Bill 409** and **Senate Bill 273** to split the **District of New Jersey** into the **Southern District of New Jersey** and the **Northern District of New Jersey**. Well, they were overruled and those favoring that Jersey should now having two of everything (but without more Federal Judges) lost, at least for the time being. The **Judicial Council** found, and so Ordered, that "no strong and compelling need has been shown to split the **District of New Jersey** into two Federal Judicial Districts." So we guess from this that the Jersey Federal Judiciary cannot be equated to hands, eyes or ears, but to a "mouthpiece," where only one is needed. But how final is this Order?

THE FEDERAL CLE CORKBOARD™

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Bradley Mellor, Kim Bobrowsky and Kenneth Kelsey
FBA All Day CLE (9 AM – 4 PM) Seminar*

Tues, November 13, 2001--Leading Edge Federal Construction Contract Issues,
FBA LearnAbout™ Monthly CLE Luncheon Series*

Tues, December 11, 2001—The Federal Mediation and Conciliation Service,
Jack Yoedt and Fulton Micklos
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*FBA - For information and reservations call Arnie Steinberg at 412/434-1190
Check this Column each month for possible revisions.

*The purpose of **Federally Speaking** is to keep you abreast of what is happening on the Federal scene All Western Pennsylvania CLE providers who have a program or programs that relate to Federal practice are invited to advise us as early as possible, in order to include mention of them in the **Federal CLE Corkboard™**. Please send Federal CLE information, any comments and suggestions you may have, and/or requests for information on the Federal Bar Association to: Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266. (412/566-2520; FAX 412/566-1088; E-Mail blipson@wgbglaw.com).*

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